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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

LEE RAKESTRAW, JOHN L. BARKER,
ALLEN E. BARSETH, ET AL.,
Petitioners,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
and UNITED AIRLINES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Defendant-Respondent United Airlines, Inc.[1] ("United") opposes the petition for writ of certiorari filed by plaintiffs-petitioners Lee Rakestraw, et al. ("petitioners"). As explained below, the judgment in favor of United was upheld on grounds independent of whether defendant-respondent Air Line Pilots Association, International ("ALPA") breached its duty of fair representation to petitioners, and there is no basis for petitioners' request that the Court remand to the United States Court of Appeals for the Seventh Circuit to determine United's liability following a determination by this Court of ALPA's liability. Furthermore, the Seventh Circuit's conclusion that an employer

[1]United Airlines, Inc. is a wholly owned subsidiary of UAL Corporation. It has no other parents or subsidiaries within the meaning of Supreme Court Rule 29.1.

cannot be held liable for conspiring to violate a union's duty of fair representation does not conflict with the decisions of other courts of appeal and correctly reflects this Court's precedents.

STATEMENT OF THE CASE

United is a commercial air carrier. (App. 38.)[2] ALPA is the certified collective bargaining representative pursuant to the Railway Labor Act, 45 U.S.C. §§ 151 et seq. ("the RLA") of United's pilots. (App. 39.) Prior to 1984, United's practice had been to offer employment to student pilots, and place them on the payroll, while in United's pilot training program. (App. 40.) Under this practice — and pursuant to the seniority provisions of the United-ALPA collective bargaining agreement, which state that seniority accrues from "date of hire as a student pilot" — pilot trainees were provided a seniority date and tentative seniority number on their first day of training, to become final upon successful completion of training and commencement of active service as pilots. (App. 40.)

In January 1984, United and ALPA commenced lengthy negotiations for a new collective bargaining agreement. (App. 39.) During these negotiations, United foresaw the need for additional pilots based upon expansion of its services. (App. 6, 39.) To meet this need, beginning in December 1984, United selected approximately 570 individuals — commonly known as the "570" — to enter its pilot training program. (App. 6, 39.) However, United was then seeking in its negotiations with ALPA to establish a "new hire pay scale" with wages significantly below those for existing pilots, and hiring student pilots under its existing practice before completion of negotiations with ALPA would have precluded application of the new hire pay scale to the new pilots. (App. 40.) For this reason, instead of hiring the 570 as student pilots, United required each of the trainees to sign a "Flight Officer Training Agreement" acknowledging that they were not being hired as United employees. (App. 40.) With respect to seniority, however, United treated the 570 the same as

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[2]Throughout this Brief, United will use "App." to refer to the Petitioners' Appendix.

prior trainees, providing them with seniority dates, and a tentative seniority number, upon commencement of training. (App. 40.)

On April 16, 1985, the National Mediation Board ("the NMB") released United and ALPA from mediation pursuant to Section 5, First of the RLA, 45 U.S.C. § 155, freeing ALPA to strike and United to implement its bargaining proposals on May 17, 1985. (App. 40-41.) Following the release, United offered employment to each member of the 570 effective on May 17, 1985, and later informed them that they were expected to report whether or not a strike took place, and would never be employed as United pilots unless they reported for work on May 17, 1985. (App. 41.) ALPA, on the other hand, urged the 570 to respect ALPA's picket lines, and promised to do everything it could to protect their employment rights if they honored the strike. (App. 41.) When the strike occurred, all but 31 of the 570 refused to cross the ALPA picket line, and United refused to hire them until later ordered to do so by a federal district court. (App. 47.)

Following release by the NMB, United also began to recruit pilots to work as permanent replacements in the event of a strike by ALPA. (App. 41.) Between May 17, 1985, and the end of the strike on June 15, 1985, United hired 539 strike replacements — the so-called "539" — including petitioners. (App. 49.) Approximately 219 of the 539, and all of the petitioners, were already qualified to fly the type of aircraft United operated, and thus were called "fleet qualified" pilots. (App. 39, 49.) To attract fleet qualified pilots from positions with other carriers, United entered into individual employment agreements pursuant to which they were guaranteed permanent employment with United following the strike with annual salaries of at least $50,000 or $75,000, depending on position. (App. 41-42.) The remainder of the 539 were treated as ordinary new hires. (App. 49.) Like all other United pilots, all of the 539 were provided with seniority dates based on the date they entered pilot training pursuant to the terms of the United-ALPA collective bargaining agreement. (App. 6-7.)

The strike ended on June 15, 1985. (App. 7, 50.) In a Back to Work Agreement, United and ALPA agreed to submit several issues to litigation, including whether United's refusal to hire the

570 because of their support of ALPA's strike violated the RLA. (App. 7.) Following an expedited trial, on August 1, 1985, the district court in that litigation ruled in favor of ALPA on the issue, and ordered United to hire the 570 into the first available openings with seniority rights based upon their initial training dates. *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 614 F. Supp. 1020, 1043, 1051, *modified*, 616 F. Supp. 849 (N.D. Ill. 1985). As a result, United began recalling the 570 to active employment on November 9, 1985. (App. 51-51.)

On September 30, 1986, after the 570 had begun employment pursuant to the district court's earlier order, the United States Court of Appeals for the Seventh Circuit reversed on the ground that the 570, as trainees, never became "employees" within the meaning of the RLA, and thus had no right to strike under that statute. *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886, 911-17 (7th Cir. 1986). On March 30, 1987, this Court denied ALPA's petition for certiorari. *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 480 U.S. 946 (1987).

Following the denial of certiorari, United informed ALPA that it would retain the 570 as United employees only if their seniority dates were adjusted so as to place them behind all of the strike replacements on the pilot seniority list. (App. 8, 53-54.) While ALPA vigorously objected to the adjustment, it had no right to strike over the issue. (App. 8, 53-54.) As a result, on April 3, 1987, ALPA signed the so-called "570 Agreement" which provided, *inter alia*, that the seniority of the 570 would be adjusted to November 9, 1985, to place the 570 below the 539 on the seniority list, and that ALPA would not challenge or demand to modify such seniority dates. (App. 8, 54.)

The 1985 collective bargaining agreement between United and ALPA, reached during the strike, became "amendable" on April 1, 1988, when the parties began negotiations which continued off and on through April 1991. (App. 59.) During these negotiations, ALPA sought an agreement to restore the relative seniority positions which the 570 were given by United prior to the strike, and which were ordered by the district court and continued in effect until April 1987. (App. 9, 59.) United eventually agreed to such a provision as part of a new collective bargaining agreement

which the parties reached in April 1991. (App. 9, 61.) United agreed to this provision, despite ALPA's promise in 1987 not to demand renegotiation of the seniority dates given the 570, because United had come to believe that the modification would be necessary to eliminate vestiges of the 1985 strike and restore productive labor relations on the property, and because ALPA's proposal placed all United pilots on the pilot seniority list in the order in which they first entered training and thus restored the seniority list to its historic basis. (App. 9, 63.) Although ALPA's proposal did not modify the seniority dates of petitioners and the other strike replacements, the effect of the proposal was to place such pilots, all of whom entered training after May 17, 1985, behind the 570 in terms of *relative* seniority. (App. 9, 63.)

Petitioners filed the present action shortly after United and ALPA announced tentative agreement on the new collective bargaining agreement. (App. 9.) In the complaint, petitioners alleged, *inter alia*, that ALPA breached its duty of fair representation to them by renegotiating their relative seniority position, and that United was jointly liable for "colluding" in ALPA's breach of duty by agreeing to its bargaining proposals. (App. 9, 71-84.) Following trial, the district court on May 31, 1991, issued a written opinion finding that ALPA had breached its duty of fair representation to petitioners because of its bargaining position. The district court held, however, that United had not "colluded" in ALPA's breach, finding that United had no hostility or animus toward the 539, and that merely agreeing to ALPA's bargaining proposals did not constitute collusion with the union. (App. 71-76.)

On appeal, United argued that the district court's finding that United did not collude in ALPA's breach of duty was not clearly erroneous, and that in any event an employer could not be held liable under any circumstances for a union's breach of duty of fair representation because such liability would in effect extend the duty of fair representation to the employer. *See American Postal Workers Union, Local 6885 v. American Postal Workers Union*, 665 F.2d 1096 (D.C. Cir. 1981) (employer cannot be held liable for conspiring in union's breach of duty of fair representation). (App. 23-24, 76.) The Seventh Circuit reversed the district

court's finding as to ALPA's breach of the duty of fair representation and affirmed the judgment in favor of United, stating in total:

> "It is equally futile to charge United with 'conspiring' with ALPA to violate its duty of fair representation. There was no violation. Employers are free to prefer one group of employees over another; the fleet qualified pilots, as recipients of a hefty preference, are in no position to protest that offsetting benefits have been ceded to another group. And it is preposterous to depict United as hostile to the fleet qualified pilots. It wanted to save money and reduce strife among its pilots, recognizing that doing so weakened management's hand in any future conflict." (App. 23-24.)

Petitioners sought reconsideration, with a suggestion for reconsideration en banc, before the Seventh Circuit. In this motion, petitioners asserted that the court had "summarily disposed of the issue of United's liability" based on its ruling in favor of ALPA. Although United asserted in its responsive papers that the judgment in its favor was based on independent grounds, petitioners did not ask the Seventh Circuit to clarify this point. The Seventh Circuit denied petitioners' motion for reconsideration on April 6, 1993. (App. 27-33.)

REASONS FOR DENYING THE PETITION

In the petition for writ of certiorari, petitioners set forth three questions for review which concern only the appropriate standard for determining *union* liability for breach of the duty of fair representation, and do not seek review of any issue concerning employer liability. Nevertheless, in a footnote petitioners state:

> "United was joined as a defendant, and is a respondent to this petition, because plaintiffs alleged that United participated in ALPA's breach of duty of fair representation, and also urge that United should be joined to 'insure complete and meaningful relief.' *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 329 (1969).
>
> The Seventh Circuit's holding that United is not liable (App. 22-23) follows and appears to be derivative of the

absolution of ALPA from liability, but in *dictum* that court also implied that an employer pursuing its separate economic interest could never be responsible for a union's violation of the duty, at least if it held no malice toward the affected employees. That point was settled to the contrary of the *dictum* by *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 569-70 (1976); see also *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 759 (3d Cir. 1977).

In petitioners' view, should certiorari be granted and the judgment below reversed, the issue of United's liability should be remanded for further consideration." Petition for Writ of Certiorari at 8 n.4.

As shown below, petitioners' request is inappropriate as a matter of procedure, because the judgment in favor of United was based on grounds independent of ALPA's liability of which petitioners have not sought review, and incorrect as a matter of law, because an employer cannot be liable for collusion in a union's breach of duty of fair representation.

I.

THE COURT OF APPEALS UPHELD THE JUDGMENT IN FAVOR OF UNITED ON GROUNDS INDEPENDENT OF WHETHER ALPA BREACHED ITS DUTY OF FAIR REPRESENTATION.

In alleging that United was liable for "collusion" in ALPA's alleged breach of duty, petitioners relied upon *United Independent Flight Officers v. United Airlines, Inc.*, 756 F.2d 1274 (7th Cir. 1985), which in dictum stated that an employer might be liable for "collusion" in a union's breach of duty of fair representation, but held that merely agreeing to the union's collective bargaining proposals as a matter of law did not constitute actionable "collusion." (App. 74.) In the district court, United argued that under this standard it had not colluded in ALPA's alleged breach of duty because United had not acted in bad faith or out of animus toward plaintiffs, and the district judge so found. (App. 76.) On appeal, United argued that this finding was not clearly erroneous, and that in any event an employer as a matter of law could not be

held jointly liable for a union's breach of duty of fair representation (as opposed to independent liability for its own breach of contract or tortious conduct), because such liability would effectively extend the duty to the employer.

Although the Seventh Circuit's discussion of these issues was short, in light of the arguments made to it and the fact that no discussion would have been necessary had the sole basis for the court's decision been its finding in favor of ALPA, the only reasonable interpretation of the Seventh Circuit's opinion is that it adopted United's arguments on these points. Thus, while petitioners seek to characterize the Seventh Circuit decision as "derivative of the absolution of ALPA from liability," it is not.

In light of the independent basis for judgment in favor of United, petitioners' request for a remand to the Seventh Circuit to determine United's alleged liability following a decision by this Court with respect to ALPA's liability is clearly inappropriate. If petitioners had desired to obtain review of the Seventh Circuit's rulings with respect to United, they should have asked this Court directly to consider those issues. Similarly, if they believed there was some ambiguity as to the basis for the Seventh Circuit's ruling in favor of United, they should have asked the Seventh Circuit to clarify its holding. Having not taken either course, petitioners cannot now ask the Court to remand the case against United if they are successful against ALPA.

II.

AN EMPLOYER CANNOT BE HELD LIABLE FOR A UNION'S BREACH OF DUTY OF FAIR REPRESENTATION.

Even if there were some procedural basis for petitioners' request for a remand to determine United's liability following a decision by this Court with respect to ALPA's liability, the premise of petitioners' legal argument is inaccurate. Petitioners argue that the "implication" in the Seventh Circuit's opinion that "an employer pursuing its separate economic interest could never be responsible for a union's violation" of the union's duty fairly to represent all employees conflicts with this Court's opinion in

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 569-70 (1976), and the Third Circuit's opinion in *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 759 (3d Cir. 1977). There is no such conflict.

Petitioners' confusion results from a failure to distinguish between jurisdiction and liability. The issue in *Hines* was whether a union's breach of duty of fair representation in processing a grievance created federal court *jurisdiction* to litigate, or relitigate, a claim against the employer for breach of collective bargaining agreement. The employer's liability was based on its own breach of contract, not on alleged collusion in the union's breach of its duty. Likewise, although the *Goclowski* decision at times reflects the same confusion, it ultimately finds employer liability based on its own conduct in "undermining of the basic collective bargaining agreements," and not on some theory of joint liability for the union's wrongdoing. *See* 571 F.2d at 761 n.18.

As United argued to the Seventh Circuit, the dictum in *United Independent Flight Officers* which states that an employer may be liable for "collusion" in a union's breach of duty of fair representation, reflects the same confusion between jurisdiction and liability. Under the authority upon which *United Independent Flight Officers* relies, *Alvey v. General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980), the employer's "collusion" in the union's breach of duty of fair representation was the basis for federal jurisdiction over a cause of action against the employer for breach of contract, and not an independent source of employer liability. *See also Graf v. Elgin, J. & E. Ry. Co.*, 697 F.2d 771, 780-81 (7th Cir. 1983); *Raus v. Brotherhood of Railway Carmen*, 663 F.2d 791, 796-98 (8th Cir. 1981).

Despite the dictum in *United Independent Flight Officers*, United is unaware of any decision holding an employer jointly liable for a union's breach of duty of fair representation. In fact, the only decision of which United is aware that has expressly considered the question, *American Postal Workers Union, Local 6885 v. American Postal Workers Union*, 665 F.2d 1096 (D.C. Cir. 1981), reached the same result as the Seventh Circuit decision here, holding that to hold an employer liable for conspir-

acy in a union's breach of duty would effectively extend that duty to the employer. In fact, the D.C. Circuit noted, an employer is "required only to bargain in good faith with the employees' exclusive representative, and, in so doing, [is] expected to represent its own interests, not those of the employees." 665 F.2d at 1109. Thus, contrary to petitioners' contention, there is no conflict in the circuit courts, or with cases in this Court, which requires this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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